

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
March 21, 2007 Session

**JOYCE A. UNDERWOOD, ET AL. v. NATIONAL ALARM SERVICES, INC.**

**Direct Appeal from the Circuit Court for Knox County  
No. 1-298-05     Hon. Dale C. Workman, Judge**

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**No. E2006-00107-COA-R3-CV - FILED MAY 14, 2007**

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Ms. Underwood and four children were injured when her home caught fire in the early morning hours of July 21, 1999; two of the children died shortly after being transported to the hospital. Ms. Underwood sued the alarm company that provided emergency monitoring services for the home, alleging several theories of negligence. The contract between the parties contained a limitation of liability/liquidated damages clause, which limited the recovery of Ms. Underwood to \$250. The trial court granted summary judgment to the alarm company, finding that: (1) the alarm company did not owe a duty to Ms. Underwood because she had failed to pay monthly monitoring fees due under the contract; (2) the exculpatory and limitation of liability clauses in the contract were valid; and (3) the alarm company established that it was not negligent, and Ms. Underwood failed to present evidence creating a genuine issue of material fact for trial. We hold that the alarm company did owe a duty to Ms. Underwood, despite her failure to pay fees, and that the limitation of liability clause at issue in the contract is valid and limits Ms. Underwood's recovery to \$250. We also find that there are genuine issues of material fact which preclude the granting of summary judgment. Therefore, we affirm in part and reverse in part.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Reversed in Part; Case Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Kevin W. Shepherd, Maryville, Tennessee, for the Appellant, Joyce A. Underwood, individually, as administrator of the Estate of Joshua Underwood, and on behalf of Isaiah Underwood, a minor.

Matthew J. Evans and John W. Elder, Knoxville, Tennessee, for the Appellee, National Alarm Services, Inc.

## OPINION

### *I. Background*

This negligence case stems from a house fire which occurred at the Knoxville home of Joyce Underwood in the early morning hours of July 21, 1999. Two children died as a result of the blaze, another two were injured, and Ms. Underwood sustained a heart attack and other injuries during the incident. Before discussing the details of the fire, we will recount the legal framework that forms the basis for this lawsuit.

Approximately five months before the fire, Ms. Underwood contracted with the defendant, National Alarm Services, Inc., d/b/a Volunteer Alarm, to install a smoke detector and provide monitoring services for the security and smoke detection system at her house, where she also operated a licensed day care facility. The system installed at Ms. Underwood's house was selected to meet state day care standards. Ms. Underwood signed an "Alarm System Monitoring and Installation Agreement" ("Agreement") with National Alarm on February 3, 1999, which provided a limitation of liability as follows:

Subscriber understands and agrees that if Company should be found liable for loss or damage due from a failure of Company to perform any of the obligations herein, including but not limited to installation, maintenance, monitoring or service or the failure of the system or equipment in any respect whatsoever, Company's liability shall be limited to Two Hundred Fifty (\$250) Dollars as liquidated damages/limitation of liability and not as a penalty and this liability shall be exclusive; and that the provisions of this section apply if loss or damage, irrespective of cause of origin, results directly or indirectly to persons or property from performance or non-performance of the obligations imposed by this contract, or from negligence, active or otherwise, its agents, assigns or employees.

If [S]ubscriber wishes Company to assume limited liability in lieu of the liquidated damages as herein above set forth, Subscriber may obtain from Company a limitation of liability by paying an additional monthly service charge to Company. If Subscriber elects to exercise this option, a rider shall be attached to this agreement setting forth the terms, conditions and the amount of the limited liability, and the additional monthly charge. Such rider and additional obligation shall in no way be interpreted to hold Company as an insurer.

The fee for National Alarm's monthly monitoring service was \$19.95. According to an affidavit provided by the company's president, Steve Choura, Ms. Underwood paid the initial monitoring fee in February of 1999 when she signed the contract, but she did not pay any monitoring

fees after that. Ms. Underwood's account was in default at the time of her house fire in July of 1999. However, neither party contends that National Alarm terminated its contract with Ms. Underwood for nonpayment, although it had the option to do so.

On the night of the blaze, Joyce Underwood was asleep in her Knoxville residence. Staying with her that night were four young relatives, Joshua Underwood, age 10; Isaiah Underwood, age 6; 9-year-old Stefon Colquitt; and Jonesha Colquitt, age 8. According to Ms. Underwood's deposition, she was awakened by her neighbor, Robert Dixon, Jr. After she was awakened, she heard the smoke detector in her hall and the alarm system going off. Joshua Underwood also confirmed that he could hear the alarms while he was running through the house and after he got out of the house.

Several neighbors also heard the alarms. Robin Johnson stated in her deposition that an alarm of some sort woke her up at 12:30 a.m., and she thought that it was a car alarm. Ms. Johnson said she knew the exact time because she looked at her bedside clock. She then drifted back to sleep with the alarm still ringing. Ms. Johnson said she was awakened a short time later by a "loud banging in my backyard." In her affidavit, Ms. Johnson stated that when she looked out the window, she saw her neighbor, Mr. Dixon, beating on the patio door of Ms. Underwood's home. In response to her inquiry, Mr. Dixon stated that Ms. Underwood's house was on fire and he was trying to wake her. At that time, Ms. Johnson stated that she noticed smoke coming from Ms. Underwood's home. She also said that "there were no emergency vehicles of any kind assisting despite the continual sounding of the alarm. It wasn't until some time later that the emergency vehicles arrived."

According to Mr. Choura, National Alarm contacted 911 within 42 seconds of receiving the signal from the smoke detector system at Ms. Underwood's residence. Upon doing so, National Alarm was informed that the fire had already been reported by a neighbor and emergency units were on their way to the home. In his affidavit, Mr. Choura did not state what time National Alarm received the signal from Ms. Underwood's alarm system, nor did he specify the time that National Alarm contacted 911. Evidence provided by Ms. Underwood indicates that National Alarm did not notify 911 of the fire until 1:39 a.m.

Although everyone in the Underwood home escaped the fire, Stefon and Jonesha Colquitt died at the hospital a few hours later as a result of smoke inhalation and carbon monoxide poisoning. Joshua and Isaiah Underwood were treated for burns, smoke inhalation, and carbon monoxide poisoning.<sup>1</sup> While trying to save the children, Ms. Underwood suffered a heart attack, for which she also required medical treatment.

Gary Young, a fire investigator employed by Allstate Insurance Company, testified that the fire began due to a short in an electrical cord. The leg of a freezer had been placed on the power cord, resulting in the cord's failure. He stated that the fire in Ms. Underwood's home burned for a maximum of 30 minutes, including the time it took firefighters to extinguish the blaze. Mr. Young

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<sup>1</sup> Joshua Underwood died on January 29, 2002, as a result of an unrelated automobile accident.

said that the room where the freezer was kept sustained severe fire damage, and it was the only room that showed evidence of “significant structural damage” as a result of the fire. He also stated that none of the bedrooms had fire damage, although the bedrooms did incur smoke damage.

Ms. Underwood filed suit on behalf of herself and Joshua and Isaiah Underwood, alleging that National Alarm was negligent in virtually every aspect of its operations relating to the alarm system in her home.<sup>2</sup> National Alarm filed a motion for summary judgment, which was granted by the trial court. Ms. Underwood appeals.

## ***II. Issue***

The sole issue presented for review, as restated, is whether the trial court erred by granting summary judgment to National Alarm.

## ***III. Standard of Review***

Summary judgment is appropriate only when the moving party demonstrates that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” TENN. R. CIV. P. 56.04. When reviewing a motion for summary judgment, this Court is required to view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party’s favor. See *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997), *Byrd v. Hall*, 847 S.W.2d 208, 210-11 (Tenn. 1993). The burden of proof rests with the moving party, who must establish that its motion satisfies these requirements. *Staples v. CBL & Associates, Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000). If the moving party makes a properly supported motion, the burden shifts to the nonmoving party to establish the existence of disputed material facts. *Id.* (citing *Byrd v. Hall*, 847 S.W.2d at 215). If, however, the moving party fails to make a properly supported motion, “the non-moving party’s burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail.” *Staples v. CBL & Associates, Inc.*, 15 S.W.3d at 88.

The standards governing the assessment of evidence in the summary judgment context are well established. Trial courts are obligated to consider pleadings, depositions, answers to interrogatories, admissions, and affidavits, to the extent that these are part of the record, in determining whether summary judgment should be granted. See *AmSouth Bank v. Soltis*, No. E2005-00452-COA-R3-CV, 2005 WL 3601460 at \*2 (Tenn. Ct. App. E.S., filed Dec. 29, 2005); TENN. R. CIV. P. 56.04. Summary judgment is appropriate only when the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. See *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

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<sup>2</sup> Among other things, Ms. Underwood alleged that National Alarm was negligent in failing to: select and install an alarm system that adequately notified National Alarm of fire and smoke and that adequately notified emergency officials of such threats; properly monitor and promptly respond to signals from Ms. Underwood’s alarm system; staff its facility with a sufficient number of trained employees to respond to alarm signals; install an alarm that was loud enough to awaken residents of the home and notify neighbors of the existence of fire and smoke.

Because a trial court's decision to grant a motion for summary judgment is solely a matter of law, it is not entitled to a presumption of correctness. See *Staples v. CBL & Associates, Inc.*, 15 S.W.3d at 88 ; *Carvell v. Bottoms*, 900 S.W.2d at 26. Consequently, our task is to review the record to determine if the requirements of Rule 56.04 of the Tennessee Rules of Civil Procedure have been met. *Staples v. CBL & Associates, Inc.*, 15 S.W.3d at 88.

#### *IV. Analysis*

In its order granting summary judgment to National Alarm, the trial court made the following findings:

1. At the time of the fire in July, 1999, the Plaintiff Joyce Underwood had not paid fees due under the service contract. As such, no duty was owed by the Defendants. Failure by the Plaintiff to pay the fees under the contract was a substantial breach of the contract.
2. The exculpatory clauses and the clauses limiting liability are valid under Tennessee law. Those exculpatory clauses and limits of liability form a part of this contract and operate as intended to limit liability.
3. The Defendant has established through expert proof, both deposition and affidavit, that it was not negligent in the monitoring of this fire on July 21, 1999. The Plaintiff has presented no counter-veiling [sic] proof to create a material issue of fact.

We will review each of these findings separately.

##### *A. Duty*

To establish her negligence claim, Ms. Underwood must prove: (1) a duty of care owed to her by National Alarm; (2) a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause. *Coln v. City of Savannah*, 966 S.W.2d 34, 39 (Tenn. 1998) (citing *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993)). Whether a duty of care is owed is a question of law to be decided by the trial court. *Id.*

In order to prevail on its motion for summary judgment, National Alarm must affirmatively negate an essential element of Ms. Underwood's claim or conclusively establish an affirmative defense. Thus, if National Alarm established that it did not owe a duty to Ms. Underwood because she failed to pay her monitoring fees for several months, then National Alarm would be entitled to judgment as a matter of law.

National Alarm asserts that it owed no duty to Ms. Underwood because she had already breached the contract by failing to pay the monthly monitoring fee. The Agreement provided as follows regarding nonpayment:

In the event the Customer fails to make timely payments for monitoring services or files for bankruptcy protection, the Company may at it[s] sole discretion terminate monitoring services, terminate this Agreement and in such an event all payments due under this Agreement or any renewal shall be immediately due and owing by Customer to the Company.

Thus, under the provisions of the Agreement, National Alarm could have terminated its contract with Ms. Underwood because she did not pay the \$19.95 per month fee. If National Alarm had terminated the Agreement, it would not owe a duty to Ms. Underwood on that basis. However, there is no evidence in the record to indicate, nor does National Alarm assert, that it exercised its right to terminate the Agreement. Therefore, National Alarm was bound by the terms of its Agreement with Ms. Underwood, and it owed Ms. Underwood a duty to perform the obligations of that contract with reasonable care.

National Alarm also maintains that Ms. Underwood should not be permitted to recover under the terms of the Agreement because she breached the contract first. For this proposition, National Alarm relies on two of our decisions, *United Brake Systems, Inc. v. American Environmental Protection, Inc.*, 963 S.W.2d 749, 756 (Tenn. Ct. App. 1997), and *Carter v. Krueger*, 916 S.W.2d 932, 934 (Tenn. Ct. App. 1995), where we held that a party who breaches a contract cannot recover damages for breach of contract from the other party. However, there is a limit to the circumstances in which this rule may be applied. In *Hogan v. Diccico*, 1991 WL 139719, at \*4 (Tenn. Ct. App. W.S., filed July 31, 1991), we held that “a plaintiff is entitled to recover damages for breach of contract if defendant’s breach of contract was the direct and proximate cause of the damages which plaintiff allegedly sustained, without the contributing fault of the plaintiff.” Here, the damages incurred by Ms. Underwood and her family can be traced directly to the alleged negligence of National Alarm, and Ms. Underwood’s failure to pay the monthly monitoring fee in no way contributed to the tragedy that occurred. Therefore, we find that Ms. Underwood’s lack of payment is not a bar to her recovery in this case.

We find that National Alarm owed a duty to Ms. Underwood as a matter of law, and the trial court erred by finding otherwise.

### ***B. Limitation of Liability/Liquidated Damages Clause***

Although the trial court referred to “exculpatory clauses and clauses limiting liability” in its order, the parties’ contract did not contain an exculpatory clause, but rather a limitation of liability/liquidated damages clause. If this clause is valid, Ms. Underwood may only recover a maximum of \$250, even if she is able to prove all of the allegations enumerated in her complaint.

In Tennessee, clauses limiting liability for negligence or breach of contract have generally been upheld in the absence of fraud or overreaching. *Houghland v. Security Alarms & Servs., Inc.*, 755 S.W.2d 769, 773 (Tenn. 1988). Consistent with the parties' freedom to construct their own bargain, they are free to allocate liability for future damages, provided that such clauses do not violate public policy. *Planters Gin Co. v Federal Compress & Warehouse Co.*, 78 S.W.3d 885, 892 (Tenn. 2002); *cf.* Tenn. Code Ann. § 62-6-123 (clauses in which one party promises to indemnify or hold harmless a party who is constructing, repairing, or performing other work on a building or structure are void as against public policy). Furthermore, limitations of liability in alarm service contracts have been enforced by this state's highest court, as well as the courts of many other jurisdictions. *See, e.g., Houghland*, 755 S.W.2d at 774; *Wadsworth v. Fox Alarm Co.*, 913 So.2d 1070, 1077 (Ala. 2005); *Central Alarm of Tucson v. Ganem*, 567 P.2d 1203, 1207-08 (Ariz. Ct. App. 1977); *Atkinson v. Pacific Fire Extinguisher Co.*, 253 P.2d 18, 22 (Cal. 1953); *United Servs. Automobile Ass'n v. ADT Security Servs., Inc.*, 2006 WL 2578019 (Ky. Ct. App. 2006); *Lazybug Shops, Inc. v. American Dist. Tel. Co.*, 374 So. 2d 183, 186 (La. Ct. App. 1979); *Alan Abis, Inc. v. Burns Electronic Security Servs., Inc.*, 283 So. 2d 822, 826 (La. Ct. App. 1973); *Reed's Jewelers, Inc. v. ADT Co.*, 260 S.E.2d 107, 110 (N.C. Ct. App. 1979); *Vallance & Co. v. DeAnda*, 595 S.W.2d 587, 590 (Tex. Civ. App. 1980); *Schepps v. Am. Dist. Tel. Co. of Texas*, 286 S.W.2d 684, 690-91 (Tex. Civ. App. 1955).

In *Houghland*, the Tennessee Supreme Court upheld the validity of an alarm services contract with terms very similar to those agreed to by National Alarm and Ms. Underwood, describing the contract as follows:

The original contract recited that Security Alarms was not in the business of writing burglary or other kinds of insurance. . . . The contract also contained a liquidated damages clause which fixed the liability of appellant at a specified sum. This amount was agreed upon as liquidated damages and as the exclusive remedy unless the subscriber desired the appellant to assume greater liability on a graduated scale of increasing rates. No such additional coverage was purchased by the subscribers.

755 S.W.2d at 771. After determining that there was no proof of fraud or intentional misrepresentation by the alarm company, the Court found the liquidated damages clause to be a valid limitation upon any recovery by the homeowners. *Id.* at 774.

In the case at bar, Ms. Underwood signed a contract with language that bears a remarkable likeness to the contract at issue in *Houghland*. By signing the contract, Ms. Underwood acknowledged that National Alarm was not an insurer of property. The contract also provided that, in the event National Alarm was held liable for any loss relating to the provision of alarm services under the terms of the contract, then National Alarm's liability would be limited to \$250. The contract further stated that the sum was liquidated damages, not a penalty, and that the remedy was exclusive. Ms. Underwood had the opportunity to pay an additional fee for National Alarm to

assume greater liability than the \$250 limit established by the contract; however, she opted not to incur the extra expense.

Ms. Underwood has not alleged any fraud or intentional misrepresentation that might provide this Court with justification for voiding the contract or any portion thereof. Although this may be a harsh result, given the substantial damages sustained by Ms. Underwood and her family in the house fire, we are bound by precedent to enforce the liquidated damages clause that was signed by Ms. Underwood and a National Alarm representative.

In the alternative, Ms. Underwood argues that the liquidated damages clause is ambiguous and therefore, pursuant to the rules of contract interpretation, should be construed against the drafter. This is a correct statement of the law; however, we find it inapplicable to this contract. There is no ambiguity in the limitation of liability at issue in this case; indeed, it is a very sweeping and all-inclusive clause. The allegations of wrongful conduct made by Ms. Underwood fall within the scope of this clause. Therefore, Ms. Underwood's recovery, if any, is limited to \$250.

### ***C. Genuine Issue of Material Fact***

The trial court found that National Alarm had established that it was not negligent and Ms. Underwood did not present any evidence to create a genuine issue of material fact for trial. We disagree.

In support of its motion for summary judgment, National Alarm presented an affidavit from Mr. Choura, stating that National Alarm reported the fire at Ms. Underwood's home within 42 seconds of receiving the signal, but that the fire had already been reported to 911. In his deposition, Mr. Young stated that the fire could not have burned more than 30 minutes before being extinguished, thus placing the start of the fire at some time after 1 a.m.

However, there is other evidence which creates a genuine issue of material fact as to what time the fire started, whether National Alarm's equipment functioned properly, and whether it took an unreasonable amount of time for National Alarm to report the fire to 911. Ms. Johnson testified that she was awakened at 12:30 a.m. by an alarm, drifted back to sleep for a brief time, then woke up again to find her neighbor, Mr. Dixon, banging on the door to Ms. Underwood's home in an attempt to alert Ms. Underwood of the fire at her house. Emergency services received the first report of the fire at 1:39 a.m., more than an hour after the blaze allegedly started. Viewing the evidence in a light most favorable to the non-moving party, as we are required to do, we hold that a jury could reasonably conclude the alarm that the neighbor, Ms. Johnson, heard at 12:30 a.m. was the Underwood fire alarm signaling a fire in progress. From this, a jury could reasonably find that there had been a delay of over one hour in the reporting by National Alarm of the fire to 911. This could lead one to conclude that National Alarm was negligent as charged by Ms. Underwood.

Summary judgment is appropriate only when the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. See *McCall v. Wilder*, 913

S.W.2d at 153; *Carvell v. Bottoms*, 900 S.W.2d at 26. We do not find that only one conclusion can be drawn from the evidence presented by National Alarm and Ms. Underwood; therefore, this was an inappropriate case in which to grant summary judgment.

#### ***V. Conclusion***

After careful review, we hold that the trial court erred by granting summary judgment to National Alarm. However, we affirm the trial court's ruling that the limitation of liability/liquidated damages clause is valid. We vacate and remand this case to the trial court for further proceedings consistent with this opinion. Costs of appeal are taxed against the Appellee, National Alarm Services, Inc.

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SHARON G. LEE, JUDGE